BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TODD E. COOK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,181
SARA LEE BAKERY GROUP	)	
Respondent	)	
AND	)	
	)	
PACIFIC EMPLOYERS INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 20, 2005 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for a 25 percent permanent partial disability on a functional basis for injuries suffered through claimant's last day worked on December 20, 2002. The Appeals Board (Board) heard oral argument on April 21, 2006.

APPEARANCES

Claimant appeared by his attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

Did claimant suffer accidental injury which arose out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant has worked for respondent since 1987, when claimant was 18 years old. During that time, claimant worked several jobs, including the pan room, the mixing room and transports. It was while claimant was working transports in March 2002 that he began to develop problems with his breathing. Claimant's condition deteriorated to the point that he was forced to seek medical treatment, including a lung biopsy. This biopsy, which was analyzed at the Mayo Clinic, identified a bacteria in claimant's lungs called mycobacterium avium, also known in layman's terms as "hot tub lung". Claimant was also diagnosed with hypersensitivity pneumonitis. Claimant's last day worked before this test was November 18, 2002. Claimant was bedridden until December 20, 2002, and was then taken off work by the company doctor, Robert L. Wilson, M.D.

Claimant was examined and treated by several medical specialists, including Daniel C. Doornbos, M.D., board certified in internal medicine, pulmonary diseases and critical care medicine. Dr. Doornbos first examined claimant on May 23, 2003. Claimant told Dr. Doornbos he began to notice mold growing on bread products in respondent's bakery in the spring of 2002, just about the time claimant began developing breathing problems. Pulmonary testing revealed a mild restrictive ventilatory defect without significant obstruction and without significant improvement after bronchodilators. The test values were somewhat worse when compared to studies done on October 4, 2002. Dr. Doornbos diagnosed a bilateral lung disease of somewhat unclear etiology. Dr. Doornbos did agree that it was theoretically possible that claimant could have mycobacterium avium in his lungs. He agreed that the actual diagnosis is more firm if an actual culture can be made from the secretions and biopsies, which did not occur in this case. But he further agreed it is not possible to isolate the organism in every case.[1] He recommended a careful evaluation of claimant's workplace and home environment, looking specifically for sources of mycobacterium avium. This, however, was not done. Dr. Doornbos stated that claimant had some lung disease, with the biopsy strongly suggestive of exposure to mycobacteria. He said that the condition was prone to clear up spontaneously even without treatment if the source of exposure is removed. He questioned claimant's ongoing symptoms, raising the suspicion that there may be ongoing exposure, leading to further damage in claimant's lungs. He acknowledged that with a hypersensitive person, a fairly dramatic response could result from a very minimal exposure. Dr. Doornbos also agreed that if the inflammation is allowed to carry on for a long period, scarring of the lung can occur, leading to permanent damage. He also diagnosed claimant with chronic scarring of the air tubes in the lungs, which was permanent.

[1] Doornbos Depo. (Apr. 13, 2005) at 16-17.

When asked about the assumption that the hypersensitivity pneumonitis was due to environmental irritants, Dr. Doornbos stated that he had no evidence to disprove that contention. He was never fully convinced that he knew exactly what was going on in this case. He could neither prove nor disprove that this was a work-related injury.[2]

Dr. Doornbos returned claimant to work in a mold-free, dust-free and perfume-free environment as of September 16, 2003. He also recommended claimant avoid humid work environments.

Claimant was referred by his attorney to Richard W. Spann, M.D., a pulmonary specialist, board certified in internal medicine and pulmonary disease. Dr. Spann examined claimant on August 20, 2004. He acknowledged the biopsy report indicated hypersensitivity pneumonitis and mycobacterium avium. He stated the exposure to a type of bacterium over a long period of time can lead not only to an infection, but also your body makes antibodies in response to that bacteria. It is this antibody response that becomes the predominant abnormality leading to destruction of the lungs, causing stiffening and hardening. Enough destruction renders the condition permanent.

Dr. Spann testified that claimant's condition was more probably related to mold rather than any food ingredients in claimant's work place. He stated that claimant's symptoms were consistent with working under a Hastings unit which may have been faulty and had mold in it. He agreed that there was nothing to indicate claimant's condition was related to anything other than his exposure at work. He stated the exact type of mold would not be all that important. But the amount of exposure could be important in a sensitive person.

Dr. Spann's final diagnosis was interstitial pneumonitis, hypersensitivity pneumonitis related secondary to mold exposure. He did not make the diagnosis of "hot tub lung." He felt that mold was the causative factor in claimant's development of lung problems. Dr. Spann testified that if claimant were removed from the environment, his condition may not improve. However, a return to a moldy environment would make claimant's condition worse.

Respondent contends claimant has failed to prove a connection between his condition and the work environment. Respondent witnesses Randall Young, food plant sanitarian, and David Duffy, a certified industrial hygienist, performed an industrial hygiene examination and tests in respondent's plant.

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[2] Doornbos Depo. (Apr. 13, 2005) at 37-38.

Mr. Young testified that regular testing was performed at respondent's facility. However, this testing either began in late 2002 or in January 2003.[3] Any testing done in 2002 was done informally by Mr. Young. The only formal documentation from that testing was contained in a document marked as Exhibit 1.[4] According to the scale used in that document, a score of zero to 5 is normal, 6-10 indicated there could be a problem developing, 11-15 indicates a potentially serious mold condition and 15 or more causes moldy product. In June and July 2002, testing on the west wall of the stock room resulted in a rating of 8, and testing on top of a slicer indicated a count of 6. Mr. Young agreed that according to Exhibit 1, there were problem areas. He also agreed that in May 2002, counts as high as 10-12 existed in some areas. This May 2002 testing was documented in Mr. Young's handwritten notes, which he no longer had at the time of his deposition. Mr. Young agreed that claimant had been exposed at various times to both mold and floor [sic] dust.[5]

Mr. Duffy performed an industrial hygiene examination on May 19, 2003, at respondent's request. He testified that persons who develop mycobacterium avium complex (MAC) probably get it through normal contact with drinking water, including treated water systems, and in dirt and household dust. He agreed that water exposure could result from inhalation of aerosols associated with hot water systems, air conditioning cooling towers and whirlpool spas. He said MAC can be found in drinking water in hospitals. So, it is quite common in the environment. However, even with mycobacterium being so common, Mr. Duffy was unable to detect any in respondent's plant.[6] When the plant was being tested by Mr. Young, the high counts located were traced to a dry unit in which the filter medium had deteriorated. This was allowing unfiltered air into the plant.[7] By the time Mr. Duffy performed his tests, this unit had been repaired. The air sample from that unit showed no mycobacterium.[8] Mr. Duffy saw no visible mold anywhere in respondent's plant during his inspection. However, he had no information as to whether his company inspected respondent's facility before 2003. He testified that it takes 48 hours for mold to grow. So cleaning would have to be done quickly or mold would begin to grow.

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[3] Young Depo. (July 7, 2003) at 19-20; and Young Depo. (July 14, 2005) at 104-105.

[4] Young Depo. (July 7, 2003), Ex. 1.

[5] Young Depo. (July 7, 2003) at 55.

[6] Duffy Depo. at 14-15.

[7] Young Depo. (July 7, 2003) at 46.

[8] Duffy Depo. at 16-17.

Both claimant and Mr. Young testified that there was mold growing on various walls in the plant. Mr. Young said when a roof leaks, they get some mold on the walls. Those areas are cleaned and sanitized quickly with Clorox.[9]

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

K.S.A. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[13]

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[9] Young Depo. (July 14, 2005) at 85-86.

[10] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[11] K.S.A. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] K.S.A. 2002 Supp. 44-508(d).

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[14]

The Workers Compensation Board, in *Casey*,[15] was asked to consider whether an allergic rhinitis or food allergy reaction to fruit and vegetable pollen and mold constituted an accidental injury or an occupational disease. The Board found that claimant's condition presented elements both of a series of accidental injuries and an occupational disease, ultimately concluding that the claimant, Casey, suffered a repetitive traumatic condition similar to carpal tunnel syndrome, which was compensable as an accidental injury. Two of the five Board Members did dissent, arguing that the claimant's condition should have been treated as an occupational disease rather than an accidental injury. The Kansas Court of Appeals found the condition to be a hybrid, describing it as "neither fish nor fowl."[16] The court went on to find that the condition did not fall within the occupational disease provisions of the Act, as it more closely met the definition of "an ordinary disease of life" which the general public may be exposed to outside of a particular employment and which is, therefore, not an occupational disease.[17] However, the court went on to find that,

> Whether her allergic reactions are a personal injury caused by accident or an occupational disease is an analytical exercise. They have characteristics of both, but do not fit exactly into either one. Her condition was caused by repetitive trauma to her immune system over a long period of time during employment at Dillons. Consequently, she is entitled to compensation for a work-related injury.[18]

Here, the ALJ found, and the Board agrees, that claimant suffered an accidental injury which arose out of and in the course of his employment. The medical opinions of Dr. Doornbos and Dr. Spann confirm that claimant suffered an exposure to an agent which has damaged his lungs. Dr. Spann found the working conditions at respondent's plant to be consistent with this type of exposure. Dr. Doornbos was unable to point to any information to disprove that theory.

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[14] K.S.A. 2002 Supp. 44-508(e).

[15] *Casey v. Dillon Companies, Inc.*, No. 1,003,117, 2004 WL 2382718 (Kan. WCAB Sept. 21, 2004).

[16] *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 70, 114 P.3d 182 (2005).

[17] *Id*. at 73-74.

[18] *Id*. at 75.

Even with the testing done by Mr. Young and Mr. Duffy, the end result is that mold existed in respondent's plant and claimant was exposed to that mold. The Board finds that claimant has satisfied his burden of proof that his condition was caused or contributed to by the mold in respondent's plant. The Board, therefore, affirms the ALJ's award of benefits in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 20, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director